UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BOWMONT CORPORATION,	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	3:02 CV 1969 (CFD)
KROMBACHER BRAUEREI	:	
BERNHARD GMBH & CO.	:	
Defendant.	:	

RULING ON MOTION FOR PRELIMINARY INJUNCTION

Pending is the plaintiff's Motion for Preliminary Injunction [Doc. # 7]. This is an action in which the plaintiff, Bowmont Corporation ("Bowmont") alleges that the defendant, Krombacher Brauerei Bernhard Gmbh & Company ("Krombacher"), breached a contract under which Bowmont was to be the exclusive distributor of Krombacher Beer in the eastern United States. Bowmont seeks a preliminary injunction to compel Krombacher to continue performing pursuant to the agreement. For the reasons that follow, the motion is DENIED.

Following the hearing on the plaintiff's motion, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Bowmont is a licensed beer importer and distributor with its headquarters in Westport, Connecticut. Krombacher is a German company with its principal place of business in Krombach,

Germany.[1] Krombacher is the brewer of Krombacher Pils Beer ("Krombacher Beer"), currently the most popular beer in Germany.

On September 1, 2000, Bowmont and Krombacher executed a written agreement under which Bowmont was to have exclusive importation and distribution rights for Krombacher beer in 36 states (the "2000 Agreement"). As contemplated by the 2000 Agreement, the parties also executed a retainer agreement (the "Retainer Agreement") under which Krombacher agreed to pay Bowmont specified amounts for marketing and promotions; the amounts paid by Krombacher pursuant to the Retainer Agreement were to be based on the volume of Krombacher Beer purchased by Bowmont. The 2000 Agreement also set volume goals for Bowmont's distribution of Krombacher beer. The 2000 Agreement set an initial three-year term, which would automatically renew for a second three-year term, unless Bowmont decided to terminate the agreement after the first term. Krombacher also had the right to terminate the 2000 Agreement following the initial three-year term, but only if Bowmont failed to meet the stated distribution goals. The 2000 Agreement also included a forum selection clause designating Frankfurt, Germany as "the jurisdiction for all disputes arising from this agreement . . ."

The relationship between the parties went smoothly for the first few months after the 2000 Agreement was executed. For example, in February 2001, Krombacher agreed to expand the exclusive distribution territory from 36 states to include the entire United States. However, by late 2001, the parties' relationship began to deteriorate. Bowmont claimed that Krombacher had failed to provide the proper packaging for U.S. distribution as contemplated by the 2000 Agreement. The

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[1]The Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(2), as the parties are "citizens of a State and citizens or subjects of a foreign state" and the amount in controversy exceeds $75,000.

parties also had disputes regarding billing; both parties claimed that the other owed it money, and Krombacher denied Bowmont's request to convert some of its billing statements from German Marks to Euros.

On April 9, 2002, Bowmont and Krombacher representatives met at Bowmont's offices in Westport, Connecticut. At the meeting the parties agreed they should terminate the 2000 Agreement and the Retainer Agreement. They negotiated terms for a new agreement. Having agreed in principle on a number of terms of a new agreement, the parties agreed that Krombacher would later provide a written draft of the new agreement for Bowmont's consideration. There was no agreement as to all the material or essential terms of a new agreement on April 9, 2002 and both parties then understood that a new agreement would not be in place until executed in writing. Krombacher provided a signed draft to Bowmont on June 28, 2003. However, Bowmont objected to several of the provisions included in that draft and the parties continued their negotiations as to those provisions. Krombacher continued to ship Krombacher Beer to Bowmont after the April 9, 2002 meeting, and after sending the draft of the new agreement on June 28, 2003.

Further disputes regarding outstanding invoices resulted in Krombacher's refusal to continue shipments of Krombacher Beer to Bowmont. In October, 2002, Krombacher sent a letter to Bowmont indicating that it was terminating the 2000 Agreement and making a demand for monies owed by Bowmont under that agreement. Bowmont then filed this action, alleging that Krombacher's refusal to make further shipments constituted a breach of the new agreement negotiated on April 9, 2002, and filed the pending motion for preliminary injunction.

CONCLUSIONS OF LAW

I. Standard for Preliminary Injunctive Relief

The Second Circuit has cautioned that preliminary injunctive relief "is an extraordinary and drastic remedy which should not be routinely granted." Buffalo Forge Co. v. Ampco-Pittsburgh Corp., 638 F.2d 568, 569 (2d Cir.1981) (internal quotation marks omitted). Entry of a preliminary injunction is appropriate where the party seeking the injunction establishes: (a) the injunction is necessary to prevent irreparable harm, and (b) either (i) likelihood of success on the merits, or (ii) sufficiently serious questions going to the merits of the claim as to make it fair ground for litigation, and a balance of the hardships tips decidedly in favor of the movant. See, e.g., Able v. United States, 44 F.3d 128, 130 (2d Cir.1995). Thus, the first part of the standard–irreparable harm–must always be met, but the party seeking an injunction may satisfy the second prong by establishing *either* a likelihood of success or sufficiently serious questions going to the merits and a balance of hardships in its favor. Thus, here, the Court must consider whether Bowmont would suffer irreparable harm in the absence of a preliminary injunction. If so, the Court must then consider whether Bowmont is likely to succeed on the merits *or* whether Bowmont has raised sufficiently serious questions as to the merits, and the balance of hardships tips in favor of Bowmont.

II. Irreparable Harm

In Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc., 60 F.3d 27 (2d. Cir. 1995), the Second Circuit considered the circumstances under which the loss of a single product line could constitute irreparable harm for purposes of a preliminary injunction. The Court reasoned that, in the typical situation where money damages can be readily calculated, there is usually no irreparable harm. However, the Court noted that if the calculation of damages would be speculative, or if the

discontinuance of the product would result in the discontinuance of the business, preliminary injunctive relief may be appropriate:

> We believe that the governing principle is as follows. Where the availability of a product is essential to the life of the business or increases business of the plaintiff beyond sales of that product--for example, by attracting customers who make purchases of other goods while buying the product in question--the damages caused by loss of the product will be far more difficult to quantify than where sales of one of many products is the sole loss. In such cases, injunctive relief is appropriate. This rule is necessary to avoid the unfairness of denying an injunction to a plaintiff on the ground that money damages are available, only to confront the plaintiff at a trial on the merits with the rule that damages must be based on more than speculation. Where the loss of a product with a sales record will not affect other aspects of a business, a plaintiff can generally prove damages on a basis other than speculation. Where the loss of a product will cause the destruction of a business itself or indeterminate losses in other business, the availability of money damages may be a hollow promise and a preliminary injunction appropriate.

Id. at 38. Here, there was no evidence that it would be difficult or impossible to calculate the damages caused by Krombacher's refusal to continue shipment of Krombacher Beer to Bowmont (although Bowmont has argued that it will also suffer a loss of business goodwill). For example, there has been no showing that the loss of Krombacher Beer will impede Bowmont's sale of other products. However, the Court finds that, if preliminary relief is not granted, it is likely that "the loss of [Krombacher Beer] will cause the destruction of [Bowmont]," id. at 38. In 2002, sales of Krombacher Beer constituted nearly 100% of Bowmont's sales. As a result, the loss of the Krombacher account could well result in the destruction of Bowmont's business. Therefore, the Court finds that Bowmont has satisfied the "irreparable harm" standard for obtaining a preliminary injunction.

II. Likelihood of Success/Serious Questions Going to the Merits

As stated above, in order for a preliminary injunction to issue, Bowmont must demonstrate, in addition to its showing of irreparable harm, that it is likely to succeed on the merits or that there are

sufficiently serious questions going to the merits and the balance of hardships tips in its favor. See Able, 44 F.3d at130.

A. Likelihood of Success on the Merits

Bowmont has not demonstrated that it is likely it will succeed on the merits of its claim. With regard to Bowmont's claim that Krombacher's conduct has violated the agreement reached at the April 9, 2002 meeting, Bowmont has not shown that it is likely it will be able to overcome Krombacher's statute of frauds defense. The Court finds, based on the evidence presented at the preliminary injunction hearing, that the parties contemplated memorializing the agreement in writing before it became binding, and the parties were unable to agree on a final version of the written agreement. The alleged contract–an agreement regarding the distribution of Krombacher Beer in the United States–is within the statute of frauds, because it is a contract for the sale of goods that exceeded $500. See Conn. Gen. Stat. § 42-2-201.[2]

Moreover, any alleged performance by Krombacher, by filling orders for Krombacher Beer after the April 9, 2002 meeting, is insufficient to take the contract out of the statute of frauds under the theory of "part performance." Part performance of a contract can only satisfy the statute of frauds in situations where there is no other reasonable explanation for the party's "part performance" other than the existence of a valid agreement. See, e.g., LeVesque Builders, Inc. v. Hoerle, 49 Conn. App. 751, 756 (1998) ("The acts [taking a contract out of the statute of frauds] must also be of such a character that they can be naturally and reasonably accounted for in no other way than the existence of some

[2]The parties do not dispute that the Connecticut Statute of Frauds is the relevant choice of law for this issue.

contract in relation to the subject matter in dispute . . .") (citing McNeil v. Riccio, 45 Conn.App. 466, 470 (1997)). Here, the Court finds that there is "natural and reasonable" explanation for the alleged part performance by Krombacher: the continued performance of the 2000 Agreement.

Bowmont has not claimed in its motion papers that it is entitled to relief under the 2000 Agreement; its request for a preliminary injunction is limited to the alleged 2002 oral agreement discussed above. However, the Court notes that, even if Bowmont had asserted a cause of action under the 2000 Agreement, it would be unlikely that Bowmont could prevail on such a claim. The 2000 Agreement contained a forum selection clause designating Germany as the situs for the resolution of disputes under the contract. Forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972); see also Carnival Cruise Lines v. Schute, 499 U.S. 585, 593-95 (1991) (holding that even a "nonnegotiated forum selection clause" is enforceable if it is reasonable, not gained through fraud or done to discourage legitimate claims.) Of course, Bowmont's principal argument against the application of the forum selection clause is that "this action does not arise out of the 2000 [A]greement. . . . Krombacher does not and cannot allege that the [alleged 2002 Agreement] contained a choice of law or choice of forum provision." See Reply Mem. in Supp. of Bowmont's Mot. for Prelim. Inj., at 8. However, as stated above, due to the application of the statute of frauds, Bowmont is unlikely to prevail on the basis of an alleged oral agreement reached at the April 9, 2002 meeting.

Bowmont claims that, even if the Court applies the 2000 Agreement and its forum selection clause, "Bowmont's Connecticut statutory and common-law claims [counts 2 thorough 5 of the

complaint] would not be subject to that provision." However, as several courts have noted, allowing a party to avoid a forum selection clause by pleading related statutory and/or tort claims would violate the public policy supporting forum selection clauses. See, e.g., Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1360 (2d Cir. 1993) ("It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement."); Crescent Int'l, Inc. v. Avatar Communities, Inc., 857 F.2d 943, 944 (3d Cir. 1988) ("[P]leading alternate non-contractual theories is not alone enough to avoid a forum selection clause if the claims asserted arise out of the contractual relation and implicate the contract's terms.").

While there is a general presumption in favor of the enforceability of forum selection clauses, that presumption can be overcome by a "clear showing" that the clause is unreasonable. See M/S Bremen, 407 U.S. at 15. "A clause can be unreasonable if: 1) its incorporation into the agreement was the product of fraud or overreaching; 2) the complaining party will be deprived of its day in court due to the grave inconvenience of the selected forum; 3) the chosen law is manifestly unfair so as to deprive plaintiff of a remedy; or 4) the clause is in contravention of a strong public policy of the forum state." Central National-Gottesman, Inc. v. M.V. "Gertrude Oldendorff, 204 F. Supp.2d 675, 678 (S.D.N.Y. 2002) (citing Roby, 996 F.2d at 1363). Bowmont has not asserted that the forum selection clause in the 2000 Agreement is unreasonable for reasons one through three above. Rather, as noted above, Bowmont's defense to the forum selection clause is simply that the 2000 Agreement which contained it was no longer operative. Bowmont has, however, asserted a cause of action under the Connecticut Franchise Act, which may be read broadly as asserting that the application of a forum selection clause is "in contravention of a strong public policy" of the state of Connecticut, as some courts have

suggested that forum selection clauses might be inapplicable to contracts that fall under the Act. See Contractors Home Appliance, Inc. v. Clarke Distribution Corp., 196 F. Supp.2d 174, 176-77 (D. Conn. 2002) (considering possibility that forum selection clause is invalidated by the Connecticut Franchise Act's mandate that "any waiver of the rights of a franchisee under §§ 42-133f or 42-133g which is contained in any franchise agreement entered into or amended on or after June 12, 1975, shall be void.") (citing Conn.Gen.Stat. S 49-133(f)).

Here, however, Bowmont has also not demonstrated that it is likely that it will prevail on its claim that the Franchise Act is implicated by the 2000 Agreement. Connecticut General Statute § 42-133e(b) defines "franchise" as an oral or written agreement or arrangement in which:

> (1) a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, . . . and (2) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate . . . .

While there is no precise formula as to what meets the first part of the test for determining a franchise relationship under § 42-133e of a "marketing plan or system prescribed in substantial part by a franchisor," see id. at 834; Chem-Tek, Inc. v. General Motors Corp., 816 F. Supp. 123, 129 (D. Conn. 1993); Sorisio v. Lenox, Inc., 701 F. Supp. 950, 960 (D. Conn. 1988), aff'd, 863 F.2d 195 (2d Cir. 1988), the Connecticut Supreme Court and U.S. District Court in Connecticut have generally applied the factors outlined in Consumers Petroleum of Connecticut, Inc. v. Duhan, 452 A.2d 123 (Conn. Supp. 1982), to determine this issue. See Hartford Elec. Supply Co. v. Allen-Bradley Co., Inc., 736 A.2d 824, 834 (Conn. 1999); Ackley v. Gulf Oil Corp., 726 F. Supp. 353, 365 (D. Conn. 1989); Aurigemma v. Arco Petroleum Prods. Co., 698 F. Supp. 1035, 1038-39 (D. Conn. 1988);

McKeown Distributors Inc., v. Gyp-Crete Corp., 618 F. Supp. 632, 642 (D. Conn. 1985). Those factors include the level of control the putative franchisor had over the putative franchisee's: "(1) hours and days of operation; (2) advertising; (3) lighting; (4) employee uniforms; (5) prices; (6) trading stamps; (7) hiring; (8) sales quotas; and 9) management training." Hartford Elec. Supply Co., 736 A.2d at 834 (citing Petroleum, 452 A.2d at 125). Courts have also looked at whether the franchisor provided the franchisee with financial support, audited its books, or inspected its premises. See id.

The Court finds that insufficient evidence showing a "level of control" indicative of a franchise has been presented. For example, Krombacher did not dictate Bowmont's hours of operation, its pricing, or its hiring practices. It did not issue Bowmont employee uniforms or provide management training. Krombacher did not provide Bowmont financial support or audit its books. While Krombacher did agree to provide Bowmont money for advertising pursuant to the Retainer Agreement, it did not exert any control over how those funds were to be utilized. The only franchise factor that is arguably present is a "sales quota" in the 2000 Agreement. However, that is insufficient alone or in combination with the other evidence to make it likely that Bowmont will prevail on the merits. The evidence supports Krombacher's position that the 2000 Agreement did not create a franchise.[3]

Also, Bowmont has not shown that it is likely it would prevail on its claim under the Connecticut Unfair Trade Practices Act ("CUTPA"). Conn. Gen. Stat. § 42-110a, et seq. A breach of contract,

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[3]The Court need not consider the second part of the franchise analysis–whether the operation of the putative franchisee's business is "substantially associated" with the putative franchisor's commercial symbol–because in order to prevail Bowmont would have to demonstrate that it would likely succeed as to both prongs of the franchise analysis. As noted above, the Court finds that it is unlikely that Bowmont will succeed as to the first prong of the test.

without more, cannot support a CUTPA violation.

> Langer, Morgan and Belt, in their *Connecticut Unfair Trade Practices Act*, Vol. 1, at § 4.3, pp. 114 et seq. contain an excellent discussion of this problem. The law in this area is summed up at page 116 where it is said: "A number of lower court decisions have held that a simple breach of contract does not violate CUTPA . . . The difficulty has been in describing what conduct in addition to the breach is necessary to establish a CUTPA violation. A standard that a number of superior court decisions have used to describe unfairness is that the claimant must plead and prove 'substantial aggravating circumstances attending the breach.'" See Foley v. Huntiunton Co., CV87-246 145S, 1994 Lexus 765 (J.D. Fairfield), for latter proposition; for cases supporting proposition that simple breach of contract claim cannot support CUTPA claim. See Emlee Eciuip. Leasing Corp. v. Waterbury Transmission, Inc., 41 Conn. Sup. 575 (1991). See also Boulevard Associates v. Sovereign Hotels, Inc., 72 F.3d 1029, 1039 (CA.2, 1995), interpreting CUTPA.

Ford v. Barnes, No. CV98-0548082, 2000 WL 33182059, at *9 (July 12, 2000 Conn. Super.). See also Smithfield Assoc., LLC v. Tolland Bank, No. 124551, 2003 WL 431670, at * (Feb. 3, 2003 Conn. Super.) ("A breach of contract, even if intentional, does not violate CUTPA unless the claimant shows substantial aggravating circumstances surrounding the breach.") (citing Foley). Here, as noted above, it is unlikely that Bowmont will be able to prevail on its breach of contract claim. Moreover, Bowmont has not submitted evidence suggesting that there were "substantial aggravating circumstances" attending any alleged breach of contract by Krombacher. Thus, because it has not shown that it will likely prevail on its breach of contract claim or that there were aggravating circumstances surrounding any alleged breach, Bowmont has not shown that it will likely prevail on its CUTPA claim.

Thus, Bowmont has failed to demonstrate a likelihood of success on the merits as it has not demonstrated that 1) it is likely that it can overcome Krombacher's statute of frauds defense as to the alleged oral agreement formed in April 2002, that 2) it is likely that if the Court applied the 2000

Agreement it could overcome that agreement's forum selection clause, or that 3) Krombacher has engaged in activity that violates CUTPA.

B. Serious Questions Going to the Merits

As an alternative to demonstrating a likelihood of success on the merits, Bowmont is still entitled to a preliminary injunction if it can demonstrate that there are "sufficiently serious questions going to the merits of the claim as to make it fair ground for litigation, and a balance of the hardships tips decidedly" in its favor. See, e.g., Able, 44 F.3d at130.

However, "[a]s discussed above, [the Court has] found that [Bowmont] failed to demonstrate any possibility of success on the merits, let alone probability. [The Court finds], therefore, . . . [Bowmont has] failed to raise sufficiently serious questions going to the merits to make them fair ground for litigation." Blum v. Schlegel, 18 F.3d 1005, 1016 (2d Cir. 1994). Furthermore, "[b]ecause a movant for preliminary injunction must demonstrate both sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardships tipping in his or her favor" and because this Court has determined that Bowmont has not demonstrated that there are serious questions going to the merits, "it is unnecessary for [this Court] to review the district court's determination on the balance of hardships." Id.[4]

CONCLUSION

For the forgoing reasons, the plaintiff's Motion for Preliminary Injunction [Doc. # 7] is

[4]Bowmont did not pursue its counts for tortious interference of contract and violation of the Connecticut Liquor Control Act in its post-hearing memorandum. See Pl.'s Post-Hearing Mem. in Supp. of Mot. for Preliminary Injunction [Doc. # 51].

DENIED.

SO ORDERED this ____ day of September 2003, at Hartford, Connecticut

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE